



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Planning Commission

**SUBJECT:** SEE BELOW

**DATE:** September 25, 2014

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**SUBJECT: FILE NO. GPT14-002. DIRECTOR-INITIATED GENERAL PLAN TEXT AMENDMENT TO MODIFY POLICIES IN THE ENVIRONMENTAL LEADERSHIP CHAPTER OF THE ENVISION SAN JOSÉ 2040 GENERAL PLAN TO REQUIRE THAT PRE-CONSTRUCTION SURVEYS FOR MIGRATORY BIRDS BE CONDUCTED FOR CERTAIN PROJECTS THAT PROPOSE TO DISTURB TREES**

## **RECOMMENDATION**

The Planning Commission voted 5-0-2 (Commissioner Kline and Yob absent) to recommend that the City Council approve the proposed General Plan Text Amendment to modify the General Plan Policy ER-5.2 to require pre-construction surveys for migratory birds for certain projects that propose to disturb trees.

## **OUTCOME**

Should the City Council approve the General Plan Text Amendment, pre-construction surveys for migratory birds will become a standard part of the City's regulatory framework.

## **BACKGROUND**

On September 24, 2014, the Planning Commission held a public hearing to consider the proposed General Plan Text Amendment. The Director of Planning, Building and Code Enforcement recommended approval of the General Plan Text Amendment for the reasons stated in the attached staff report.

One member of the public, representing the Santa Clara Valley Audubon Society, spoke in support of the proposed General Plan Text Amendment. No members of the public spoke in opposition. Commissioner Abelite asked staff whether the proposed Text Amendment covered any birds beyond those covered by the Migratory Bird Treaty Act, to which staff answered it did not. A motion was passed 5-0-2 (Commissioner Kline and Yob absent) to recommend that the City Council approve the proposed General Plan Text Amendment as recommended by staff.

### **ANALYSIS**

A complete analysis of the issues regarding this project is contained in the attached staff report. Also attached is correspondence between Planning Staff and the Santa Clara Valley Audubon Society and the California Department of Fish and Wildlife.

### **EVALUATION AND FOLLOW-UP**

The Planning Department would review these surveys prior to the City's issuance of a grading permit, as is now done through the Mitigation Monitoring and Reporting Program (MMRP) process. Implementation will be evaluated for its conformance to the requirements of CEQA, the Migratory Bird Treaty Act, and other applicable policies.

### **PUBLIC OUTREACH/INTEREST**

Staff has followed Council Policy 6-30: Public Outreach Policy. A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. The staff report is also posted on the City's website. Staff has been available to respond to questions from the public.

### **COORDINATION**

This project was coordinated with the City Attorney's Office, the Santa Clara Valley Audubon Society and the California Department of Fish and Wildlife.

### **CEQA**

Pursuant to Section 15168 of the CEQA Guidelines, the City of San José has determined that the proposed General Plan Text Amendment is pursuant to or in furtherance of the Final Environmental Impact Report (EIR) for the Envision San José 2040 General Plan, which findings were adopted by City Council Resolution No. 76041 on November 1, 2011.

/s/

HARRY FREITAS, SECRETARY  
Planning Commission

For questions please contact Steve Piasecki, Interim Planning Official, at 408-535-7893.

Attachments: Staff Report  
Email Correspondence

## **STAFF REPORT**

### **PLANNING COMMISSION**

**FILE NO.: GPT14-002**

#### **PROJECT DESCRIPTION:**

Planning Director initiated General Plan Text Amendment request to modify to the Environmental Leadership chapter of the Envision San José 2040 General Plan to require pre-construction surveys for migratory birds for certain projects that propose to disturb trees. This amendment would further define the idea to “require that development projects incorporate measures to avoid impacts to nesting migratory birds” currently found in General Plan Environmental Resources Policy ER-5.2. The proposed text amendment would add the following language:

ER-5.2      Require that development projects incorporate measures to avoid impacts to nesting migratory birds. This shall include requiring pre-construction surveys for nesting birds prior to grading permit issuance for projects that disturb trees and begin construction during the nesting season (February 1 and August 31). Pre-construction surveys for nesting birds will be conducted by a qualified biologist within onsite trees as well as all trees within 250 feet of the site. The survey will occur within 14 days of the onset of construction. If pre-construction surveys locate active nests within or near construction zones, these nests, and an approved buffer around them (as determined by a qualified biologist), will remain off-limits to construction until the nestling/chicks have fledged and are no longer dependent on the nest.

**LOCATION:** Citywide

#### **RECOMMENDATION**

Planning staff recommends approval of the General Plan Text Amendment because it will provide greater consistency and certainty regarding pre-construction surveys for migratory birds in line with Federal and State requirements. Additionally, this Amendment will provide a CEQA streamlining benefit. This addition to the General Plan more correctly classifies pre-construction surveys for nesting birds as a standard part of the City’s regulatory framework and not a project-specific mitigation measure.

#### **BACKGROUND AND ANALYSIS**

The Environmental Leadership chapter of the Envision San José 2040 General Plan sets forth sustainability goals for San Jose through 2040. San Jose boasts a plethora of environmental resources, including more than 350 species of birds in an array of habitats throughout the City. Policy ER-5 aims to protect migratory birds by avoiding direct and indirect injury to the birds and to their nests. This goal and its related policies read as follows:

Environmental Resources Goal ER-5 – Migratory Birds

Protect Migratory birds from injury or mortality.

#### Environmental Resources Policies – Migratory Birds

- ER-5.1        Avoid implementing activities that result in the loss of active native birds' nests, including both direct loss and indirect loss through abandonment, of native birds. Avoidance of activities that could result in impacts to nests during the breeding season or maintenance of buffers between such activities and active nests would avoid such impacts.
- ER-5.2        Require that development projects incorporate measures to avoid impacts to nesting migratory birds.

The proposed text amendment would add specific language to Policy ER-5.2 regarding pre-construction surveys for migratory birds, further defining the idea to “require that development projects incorporate measures to avoid impacts to nesting migratory birds.” Development projects in which trees are being disturbed during the nesting season (February 1 through August 31) would be required to conduct pre-construction surveys prior to the City’s issuance of a grading permit, thereby ensuring, to the greatest extent possible, the preservation, management, and restoration of migratory bird habitat. The proposed text amendment would delineate a standard condition for pre-construction surveys within the General Plan, streamline environmental review for the City and eliminate the most common mitigation measure.

“Mitigation measures” are project-specific changes made to lessen environmental impacts from a project. In many cases, pre-construction surveys for migratory birds are the sole mitigation measure required of a project. For projects that do not include mitigation measures, the City can either process a Negative Declaration (which does not require a Mitigation Monitoring and Reporting Program) or an exemption under CEQA.

Measures that are a part of the City’s regulatory framework (either in the General Plan, Zoning Ordinance or adopted policies) are not project-specific and are not considered mitigation. The proposed text amendment would create specific language to include a permit condition in the development permit. If there are cases in which different measures are necessary, more restrictive measures would still be incorporated as mitigation.

Pre-construction surveys would be reviewed by staff prior to issuance of grading permit, which is consistent with current practice.

In addition, the proposed text amendment is consistent with the Federal Migratory Bird Treaty Act and the Santa Clara Valley Habitat Conservation Plan (HCP).

#### **Environmental Review**

The proposed General Plan Amendment does not propose any construction, demolition, or other activity that has the potential to negatively impact the environment. Approval of this amendment will not have a significant effect on the environment as it was determined to be consistent with the Envision San Jose 2040 General Plan Environmental Impact Report (EIR). This EIR was adopted by the City Council on November 1, 2011 under Resolution Number 76041.

**Conclusion**

The subject General Plan Text Amendment is consistent with and further clarifies the policies relating to migratory birds in the Envision San José 2040 General Plan. As stated above, this text amendment will ensure the protection of migratory bird species and will facilitate efficient environmental review for the City of San José.

**Project Manager:** Whitney Berry; **Approved by:** Sylvia D **Date:** 9/3/14

|  |                |
|--|----------------|
| Owner/Applicant:   | Attachments:   |
| City of San Jose<br>Planning, Building and Code Enforcement<br>200 East Santa Clara Street<br>San Jose, CA 95113 | Correspondence |

# RE: General Plan Text Amendment for Pre-construction Surveys for Migratory Birds

Berry, Whitney

Wed 8/27/2014 11:35 AM

Sent Items

To: shani kleinhaus <shani@scvas.org>;

Cc: Joshua McCluskey <owls@scvas.org>;

Dear Ms, Kleinhaus,

Thank you for sending your suggestions for the proposed General Plan text amendment for pre-construction surveys for migratory birds. Per your request, I have provided the revised text amendment below. We were able to incorporate some of your suggestions into this revision:

Require that development projects incorporate measures to avoid impacts to nesting migratory birds. This shall include requiring pre-construction surveys for nesting birds prior to grading permit issuance for projects that disturb trees and begin construction during the nesting season (February 1 and August 31). Pre-construction surveys for nesting birds will be conducted by a qualified biologist within onsite trees as well as all trees within 250 feet of the site. The survey will occur within 14 days of the onset of construction. If pre-construction surveys locate active nests within or near construction zones, these nests, and an approved buffer around them (as determined by a qualified biologist), will remain off-limits to construction until the nestling/chicks have fledged and are no longer dependent on the nest.

Best,  
Whitney

Whitney Berry  
Planner | Planning, Building and Code Enforcement  
City of San Jose  
(408) 535-7829

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**From:** shani kleinhaus <shani@scvas.org>

**Sent:** Sunday, August 17, 2014 7:58 PM

**To:** Berry, Whitney

**Cc:** Joshua McCluskey

**Subject:** Re: General Plan Text Amendment for Pre-construction Surveys for Migratory Birds

Dear Ms. Berry,

Thank you for sending me the proposed General Plan text amendment regarding pre-construction surveys for

migratory birds. While this is a substantial improvement on current practice, the amendment is shy of providing a biologically-relevant ordinance. Please consider the following comments and suggestions:

1. Birds nest not only in trees but also in shrubs, ruderal grasslands, and even buildings - so reconstruction surveys should include all these habitats. Please consider replacing with “disturb grasslands or remove trees and vegetation”. Also, it should be made clear that this language does not apply to species of special concern and threatened or endangered avian species, and additional surveys may be required for these species.
2. A reconstruction survey 14 days prior to construction is too long to be biologically relevant and to avoid harm to migratory nesting birds. Most birds can raise a brood of chicks within 2 weeks. So 14 days can identify existing nests, but creates too large a window for additional birds to enter a site and nest between the survey date and start of activities. To remedy this, the survey lag time should be reduced to less than that normally required by most birds to build a nest, lay eggs and start raising young. We believe that five days is the minimum biologically relevant time frame. Indeed, developers applying for permits in the City of Cupertino usually implement pre-construction surveys no more than five days prior to the initiation of construction activities.
3. We see no reason for the survey buffer to be different from the exclusion buffer. Unless a biologist stays at the project site to monitor nesting behavior and directly observe nesting birds for changes in behavior once work starts, there isn't any way to determine an 'appropriate' buffer. Thus, the buffer should be 250-ft, or a biologist must be on site to assess responses to construction activity.
4. The term 'nesting activity' is subjective; a better and more precise standard is 'fledglings no longer dependent on the nest'.

We believe that compliance with the proposed General Plan text amendment is not sufficient to ensure that no nests of species protected by the Migratory Bird Treaty Act and California Fish and Game Code will be disturbed during projects implementation.

[Here are our proposed edits.](#)

**ER-5.2 Require that development projects incorporate measures to avoid impacts to nesting migratory birds. Should a project propose to demolish buildings, disturb grassland or remove trees and vegetation, pre-construction surveys for nesting birds for development projects that propose to commence construction between February 1 and August 31. Pre-construction surveys will be conducted by a qualified biologist for nesting birds within the onsite buildings, grasslands, shrubs and trees as well as all trees within 250 feet of the site. The survey will occur within 5 days of the onset of construction. If pre-construction surveys undertaken during the nesting season locate active nests within or near construction zones, these nests, and a 250 ft buffer around them , will remain off-limits to construction until the nestling/chicks have fledged and are no longer dependent on the nest.**

Thank you,  
Please do not hesitate to call me if you have questions,

Shani

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Shani Kleinhaus, Ph.D.  
Environmental Advocate  
Santa Clara Valley Audubon Society  
(650) 868 2114  
[shani@scvas.org](mailto:shani@scvas.org)

On Aug 6, 2014, at 11:43 AM, Berry, Whitney <[Whitney.Berry@sanjoseca.gov](mailto:Whitney.Berry@sanjoseca.gov)> wrote:

Dear Shani,

I'm reaching out to let you know about an upcoming General Plan text amendment regarding pre-construction surveys for migratory birds.

Staff initiated this GP text amendment in order to add policies to the Environmental Leadership chapter of the Envision San José 2040 General Plan to require pre-construction surveys for migratory birds for projects that propose to disturb trees. This amendment would further define the idea to "require that development projects incorporate measures to avoid impacts to nesting migratory birds" currently found in General Plan policy ER-5.2. The proposed text amendment would add the following language:

ER-5.2            Require that development projects incorporate measures to avoid impacts to nesting migratory birds. Should a project propose to disturb trees, pre-construction surveys for nesting birds for development projects that propose to commence construction between February 1 and August 31. Pre-construction surveys will be conducted by a qualified biologist for nesting birds within the onsite trees as well as all trees within 250 feet of the site. The survey will occur within 14 days of the onset of construction. If pre-construction surveys undertaken during the nesting season locate active nests within or near construction zones, these nests, and an approved buffer around them (as determined by a qualified biologist), will remain off-limits to construction until the nesting activity has ceased.

This GP text amendment will be considered, along with a package of other GP amendments, by the Planning Commission on August 27, 2014.

Give me a call if you have any questions or would like to discuss. Looking forward to working with you.

Best,  
Whitney

9/3/2014

RE: General Plan Text Amendment for Pre-construction Surve... - Berry, Whitney

Whitney Berry

Planner | Planning, Building and Code Enforcement

City of San Jose

(408) 535-7829

# Re: City of San Jose General Plan Text Amendment for Pre-Construction Surveys for Migratory Birds

shani kleinhaus <shani@scvas.org>

Mon 9/22/2014 7:34 AM

Birds

To: Berry, Whitney <Whitney.Berry@sanjoseca.gov>;

Cc: Johnston, David@Wildlife <David.Johnston@wildlife.ca.gov>; Davidson, John <John.Davidson@sanjoseca.gov>; Joshua McCluskey <owls@scvas.org>;

Good Morning Whitney,

The revised language is very good. I really appreciate your taking the time to understand the issue and to communicate with stakeholders who speak for the birds,

Have a wonderful week,

Shani

Shani Kleinhaus, Ph.D.

Environmental Advocate

Santa Clara Valley Audubon Society

(650) 868 2114

[shani@scvas.org](mailto:shani@scvas.org)

On Sep 19, 2014, at 5:12 PM, Berry, Whitney <Whitney.Berry@sanjoseca.gov> wrote:

Hi Dave, Hi Shani,

We wanted to share with you the revised language we will be proposing to Planning Commission this coming Wednesday 9/24. Thank you both for working with us thoughtfully on this; we have made revisions that I think you'll be pleased with:

1. Entire site surveyed for nesting birds;
2. A biologically-relevant window during which construction surveys must be undertaken;  
and
3. Buffer around nests determined by biologist in consultation with CDFW

ER-5.2 Require that development projects incorporate measures to avoid impacts to nesting migratory birds. Development project should avoid construction during the nesting season (February 1 through August 31). Should a project propose to disturb or remove trees during the nesting season, pre-construction surveys for migratory birds will be required. A qualified biologist will conduct pre-construction surveys for nesting birds on the entire site, as well as trees and vegetation near the site. The pre-construction surveys will occur within a biologically-relevant window of time prior to the onset of construction. If active nests are

located, these nests and a buffer around them (as determined by the biologist in consultation with the California Department of Fish and Wildlife) will remain off limits to construction until the nestling/chicks have fledged and are no longer dependent on the nest.

Thanks!

Whitney Berry  
Planner | Planning, Building and Code Enforcement  
City of San Jose  
(408) 535-7829

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**From:** Johnston, David@Wildlife <[David.Johnston@wildlife.ca.gov](mailto:David.Johnston@wildlife.ca.gov)>  
**Sent:** Wednesday, September 17, 2014 2:41 PM  
**To:** Berry, Whitney  
**Cc:** Davidson, John  
**Subject:** RE: City of San Jose General Plan Text Amendment for Pre-Construction Surveys for Migratory Birds

Hi Whitney

I should start with the standard explanation/disclaimer when dealing with this kind of condition:

Out of necessity, whatever standards are adopted will not be absolutes, but attempts at using the available facts to craft the best compromise for the given situation. In this case, the compromise is between protection of bird nests and unreasonable conditions on the project. The standards you have chosen are pretty close to the ones in common use locally in the consulting/regulatory community; the breeding season is the same and the buffer is a bit of an average between the various components we use. For most circumstances within the City, that shouldn't be a problem as urban birds are likely to be somewhat less sensitive to disturbances, so 250' as a general buffer should work for the majority of cases.

The things where I would say you could do better are in the pre-survey period and the latitude given to the qualified biologist in adjusting buffers.

Pre-surveys for nests are a difficult issue no matter how you handle it. The concept is that you want to know if there are nests that might be affected by whatever the project is so the applicant can take appropriate steps if there are. The difficulty is that this is also a balance between the level of risk and the ability of the applicant to respond to the circumstances. In this case, the only biologically relevant thing is that the period by which the survey precedes the first work day should not be greater than the amount of time that it takes a bird to build a nest. If birds can easily build nests in the period after the survey, then the surveys aren't very useful. In this case, most birds can build a nest in less time than 2 weeks, so that length doesn't give you that much value in terms of risk reduction for the applicant. I recommend 72 hours tops and that still won't give you protection against swallows and swifts which can throw up a mud nest in less than a day (this is mostly a problem for DPW and others who work on overpasses).

Segueing into the next issue, which is related, the more nests that are missed by the initial survey, the more likely someone will be looking at the buffer reduction. You reduce the buffer, you increase the

risk of a violation (of the Migratory Bird Treaty Act). Unfortunately, there is HUGE variation in behavioral response towards disturbance, so there really isn't any way to accurately predict what will happen. I have worked out a procedure that works well with the local consultants, but it's complicated and requires a lot of experience, so it's not something I would recommend saddling you folks with.

The two problems I see here are that 'qualified' as in qualified biologist, isn't defined and letting the biologist decide on an appropriate buffer is likely to result in some marvelously reduced buffers-like 25-30 feet. I kid you not, this kind of nonsense gets proposed to me all the time. It's a tough one to deal with though; if the City has its own biologist on retainer, the consultant could be required to consult with him/her. You could also require them to consult with CDFW and I am always available to do that, although I am getting close to retirement and I can't guarantee my replacement would be as willing to do so. We could also work on a generic approach to use, similar to the more complicated one I mentioned above that would at least give some outside control (i.e. you guys) over the decision.

Hope that helps, feel free to give me a call or email me today or tomorrow with any questions.

Dave

Dave Johnston

CA Department of Fish and Wildlife  
(831) 464-6870

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**From:** Berry, Whitney [<mailto:Whitney.Berry@sanjoseca.gov>]

**Sent:** Wednesday, September 17, 2014 10:45 AM

**To:** Johnston, David@Wildlife

**Cc:** Davidson, John

**Subject:** City of San Jose General Plan Text Amendment for Pre-Construction Surveys for Migratory Birds

Hi Dave,

Thanks for chatting with me this morning about this amendment, and for taking a look at the proposed language below (in blue).

It is staff's intention that the proposed text amendment would delineate a standard condition for pre-construction surveys for migratory birds within the General Plan, which would create specific language to include as a permit condition for any development projects that propose construction during the nesting season. If projects will disturb protected habitat, special-status species habitat, or if there are cases in which different measures are necessary, then more restrictive measures would be incorporated as mitigation through environmental review.

ER-5.2      Require that development projects incorporate measures to avoid impacts to nesting migratory birds. This shall include requiring pre-construction surveys for nesting birds prior to grading permit issuance for projects that disturb trees and begin construction during

the nesting season (February 1 and August 31). Pre-construction surveys for nesting birds will be conducted by a qualified biologist within onsite trees as well as all trees within 250 feet of the site. The survey will occur within 14 days of the onset of construction. If pre-construction surveys locate active nests within or near construction zones, these nests, and an approved buffer around them (as determined by a qualified biologist), will remain off-limits to construction until the nestling/chicks have fledged and are no longer dependent on the nest.

Whitney Berry

Planner | Planning, Building and Code Enforcement

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